

**United States Department of Labor
Employees' Compensation Appeals Board**

T.D., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
FINANCE & ACCOUNTING SERVICE,
Columbus, OH, Employer**

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**Docket No. 14-1305
Issued: January 13, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On May 20, 2014 appellant filed a timely appeal from an April 1, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly determined appellant's pay rate for compensation purposes.

FACTUAL HISTORY

The case has been before the Board on prior appeals. On the initial appeal to the Board, the issues included a termination of compensation effective January 4, 2010, an overpayment of

¹ 5 U.S.C. § 8101 *et seq.*

\$11,630.61 based on an incorrect pay rate, denial of waiver of the overpayment, and a schedule award for a 15 percent left arm permanent impairment.² Appellant had filed a claim for injury on April 23, 1993, that was accepted for cervical, lumbosacral, left thumb, and ring finger strains, as well as metacarpophalangeal (MP) joint reconstruction surgery on May 2, 2004.

In addition, appellant filed a claim for injury on October 27, 1995, alleging that she injured her fingers on her left hand when she slammed her fingers in a door. OWCP accepted this claim for contusions and sprains of the left third and fourth fingers and left MP joint surgery on April 23, 1996. The two cases have been administratively combined.

With respect to the pay rate for compensation purposes, the Board noted that on October 27, 1995 appellant was working four hours a day. OWCP had initially paid compensation based on a weekly pay rate of \$416.73, which it found represented full-time employment on October 27, 1995. It then found that the correct pay rate should be based on the original date of injury, April 23, 1993, of \$376.19 and found an overpayment of compensation had been created.

As the Board explained, October 27, 1995 did represent a date of injury. The correct pay rate for that date would be determined by application of 5 U.S.C. § 8114. Even though appellant was working four hours a day, it was not clear what her correct pay rate would be under this statute. OWCP was directed to make a proper determination and if the pay rate on October 27, 1995 was higher than on April 23, 1993, then this would represent the correct pay rate.

By order dated December 21, 2013, the Board remanded the case to OWCP to properly resolve the pay rate issue.³ The Board also noted that it had issued a November 16, 2012 schedule award decision using the pay rate of \$376.19 based on an April 23, 1993 date of injury, without making findings as to pay rate.

In a decision dated April 1, 2014, OWCP found that there was no basis to change the pay rate from April 23, 1993. It stated that appellant did not return to full-time employment or sustain a recurrence. According to OWCP, “we paid you based on your ‘left thumb’ condition, which was accepted under case File No. xxxxxx359 and not for the conditions (sprain and contusion), which was accepted under case File No xxxxxx404 and since the job would have continued had you not sustained a new injury, there is no justification to pursue a higher pay-rate in 1995.”

LEGAL PRECEDENT

Under 5 U.S.C. § 8101(4), “‘monthly pay’ means the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than [six] months after the injured employee resumes regular full-time employment with the United States, whichever is greater....” OWCP

² Docket No. 11-1952 (issued September 10, 2012).

³ Docket No. 13-1597 (issued December 21, 2013).

regulations stated that “pay rate for compensation purposes” means the employee’s pay as determined under 5 U.S.C. § 8114.⁴

5 U.S.C. § 8114 provides:

“Average annual earnings are determined as follows--

(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --

(A) was fixed, the average annual earnings are the annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week and 260 if employed on the basis of a 5-day week.

(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection.

(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment and of other employees of the United States in the same or most similar employment in the same or neighboring location, other previous employment of the employee or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within [one] year immediately preceding his injury.”

⁴ 20 C.F.R. § 10.5(s).

ANALYSIS

As the history of the case indicates, OWCP found an overpayment of compensation had been created because appellant was paid wage-loss compensation based on an incorrect pay rate. Appellant was paid compensation based on a pay rate for compensation purposes of \$416.73, which it found represented pay for full-time work on October 27, 1995. The April 1, 2014 OWCP decision finds that a weekly pay rate of \$376.19 is correct without actually addressing the specific pay rate issues that are present in this case. It appears to find that October 27, 1995 would not represent a date of injury. OWCP refers to appellant not returning to full-time employment or sustaining a recurrence after return to full-time work. It also refers to the existence of two claims and then states “the job would have continued” without explaining how this resolves the pay rate issue.

When OWCP initially used a pay rate on October 27, 1995 of \$416.73 a week, it had not properly applied 5 U.S.C. § 8114 in determining the specific pay rate on October 27, 1995. As noted above, there are specific and well-established provisions under 5 U.S.C. § 8114 for determining the pay rate on that date. The issues include whether appellant worked substantially the whole year prior in the position, and if not whether the position would have afforded employment for substantially a whole year, or whether 8114(d)(3) should be applied to determine an amount that reasonably represents the earning capacity as of October 27, 1995. OWCP must secure relevant evidence from the employing establishment to make proper findings. As the record indicated that appellant was working part-time, it may be that the pay rate on October 27, 1995 is less than \$376.19, the pay rate on April 23, 1993. If so, OWCP can make a proper finding that the April 23, 1993 pay rate is correct under FECA.

Once the issue of the correct pay rate for compensation purposes is resolved, then OWCP can make a proper determination as to an overpayment of compensation. Since the overpayment was based on a finding of an incorrect pay rate, it is necessary to properly resolve the underlying pay rate issue. The record indicates that appellant also received a schedule award on November 16, 2012, with compensation paid based on a pay rate for compensation purposes of \$376.19. The pay rate issue would also affect the compensation issued pursuant to the schedule award. After properly resolving the pay rate issue, OWCP should issue proper decisions regarding the overpayment and schedule award issues to protect appellant’s appeal rights.

The Board had directed OWCP to make a determination as to the pay rate on October 27, 1995 and determine whether it was greater than the pay rate on April 23, 1993. It is necessary that OWCP act in accord with the Board’s determinations as otherwise there would be no finality of decisions and the appeals procedure would be nullified.⁵ The case will again be remanded to OWCP for proper findings on the issues presented.

On appeal, appellant refers to an April 23, 2014 decision from OWCP. However, it appears that the document she is referring to is an informational letter dated April 23, 2014 noting the accepted left hand conditions from the October 27, 1995 claim and stating that it was

⁵ See *E.C.*, Docket No. 14-588 (issued July 1, 2004); *Anthony Greco*, 3 ECAB 84 (1949).

in a denied status. This was not a final decision with appeal rights,⁶ but an informational letter responding to a telephone call. The Board's jurisdiction is limited to final decisions of OWCP arising under FECA.⁷ Appellant may pursue compensation issues regarding the 1995 injury with OWCP and receive an appropriate final decision, but on this appeal the Board is limited to review of the April 1, 2014 final decision.

CONCLUSION

The Board finds that OWCP did not properly determine appellant's pay rate for compensation purposes and the case is remanded to OWCP for further development.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 1, 2014 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 13, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

⁶ See 20 C.F.R. § 10.126, providing that a decision contains findings of fact, statement of reasons, and information about appeal rights.

⁷ *Id.* at § 501.2(c).